

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

**Northern Plains Resource
Council, et al.,**

Plaintiffs,

v.

**U.S. Army Corps of Engineers,
et al.,**

Defendants,

and

**TransCanada Keystone
Pipeline, LP, et al.,**

Defendant-Intervenors.

Case No. 4:19-cv-44-BMM

**Federal Defendants’
Response to American Gas
Association, et al.’s, Motion to
Intervene**

This case involves the U.S. Army Corps of Engineers’ issuance of Nationwide Permit 12, a general Clean Water Act Section 404 permit of national applicability authorizing certain minimal impacts to waters of the United States associated with the construction, maintenance,

repair, and removal of utility lines, including pipelines. *See* Issuance and Reissuance Nationwide Permits, 82 Fed. Reg. 1860, 1985–86 (Jan. 6, 2017); Am. Compl. ¶¶ 191–205, 218–27, ECF No. 36. As indicated in the motion to intervene, Federal Defendants do not oppose *permissive* intervention for the movant-organizations (the “Coalition”).

Intervention as of right, however, would not be appropriate because Plaintiffs do not seek to vacate Nationwide Permit 12.¹ *See* Am. Compl. at 87–88 (prayer for relief).

Intervention as of right under Rule 24(a)(2) requires, among other things, that “disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest.” Fed. R. Civ. P. 24(a)(2). The Coalition claims an interest in its members’ future reliance on the Nationwide Permit 12. *See* Coalition’s Mem. in Supp. at 18, 20–21.

¹ Plaintiffs also challenge the Corps’ “verification” of the nationwide permit’s applicability—a requirement in some situations defined by the permit—at a few of the Keystone XL pipeline’s planned waterway crossings. *See* Am. Compl. 206–17, 228–36. Plaintiffs seek vacatur of those verifications. *See* Am. Compl. at 88. But the Coalition does not assert an interest in the Keystone XL pipeline or those pipeline-specific claims. *See* Coalition Mem. in Supp. 1 n.2, 14 n.34, ECF No. 49.

The Coalition, however, has not demonstrated that “disposing of the action” here could “impair or impede” its members’ future reliance on the permit because Plaintiffs do not ask the Court to vacate the permit or any part of it (and appropriately so, given the permit’s wide geographic scope). Instead, Plaintiffs seek declaratory relief as to the permit’s legality, a remand of the permit to the Corps, and an injunction against the Keystone XL pipeline’s reliance on the permit. *See* Am. Compl. at 87–88. Thus, should Plaintiffs prevail on the merits—and absent some independent Corps administrative action limiting the permit’s applicability in response to a court ruling—the requested remedies, if granted, would keep the nationwide permit in place until it expires on its own terms in March 2022. In other words, the Coalition’s members would still be able to prospectively rely on the permit.

Compare that with a situation where a plaintiff were seeking to vacate the permit, in whole or in part. Should that plaintiff prevail on the merits and a court vacate the permit, the Coalition’s members would not be able to prospectively rely on the permit, as it would have been set aside. In that circumstance, we would agree that the Coalition would meet the requirements for intervention as of right in this case.

But that is not the circumstance presented by the Amended Complaint. Thus, absent some clarification from Plaintiffs that they intend to seek vacatur of the nationwide permit, intervention as of right is not appropriate.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(d)(2)(B), I hereby certify that the above memorandum is 511 words, exclusive of the caption, signature block, and certificates of service and compliance.

Kristofor R. Swanson
Kristofor R. Swanson

CERTIFICATE OF SERVICE

I certify that on October 24, 2019, I filed the above pleading with the Court's ECF system, which caused notice to be sent to counsel registered to use the Court's ECF system. In addition, I certify that I sent the above pleading, via email, to the following attorneys, whose petitions for pro hac vice admission remain pending:

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